Supreme Court, U.S.
FILED

011507 APR - 9 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CLAY COUNTY SCHOOL BOARD, and DAVID OWENS in his official capacity as Superintendent of Clay County Schools,

Petitioners,

v.

DAWN F. WILSON and KAY S. EARHART,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH B. WRIGHT, ESQUIRE
Counsel of Record
SAMUEL S. JACOBSON, ESQUIRE
DATZ, JACOBSON, LEMBCKE & WRIGHT, P.A.
One Independent Drive, Suite 2902
Jacksonville, Florida 32202
(904) 355-5467
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4958

QUESTION PRESENTED

Does the legislative immunity of *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), apply only to individual legislators and not to the legislative body as well, and can *Bogan* immunity be circumvented by the artifice of bringing suit against the legislative body instead of individual legislators?

CORPORATE DISCLOSURE STATEMENT

This Petition for Writ of Certiorari is filed by the Clay County School Board which is a governmental corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 3

I. Facts 3

II. Basis of Jurisdiction in the United States District Court 4

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 7

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bogan v. Scott-Harris, 523 U.S. 44 (1998) ..... i, 4, 5, 6

Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981) 4

Jax v. Henslee, 201 F.3d 444 (9th Cir. 1999) 6

Kentucky v. Graham, 473 U.S. 159 (1985) 6

Supreme Court of Virginia v. Consumers Union of the U.S., 446 U.S. 719 (1980) 5

Tenney v. Brandhove, 341 U.S. 367 (1951) 5

Wilson v. New York, 1 Denio 595 (N.Y. 1845) 6

STATUTES

28 U.S.C. § 1254(1) (2001) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1343(a)(3) and (4) 4

42 U.S.C. § 1983 (2001) 2, 5

OTHER

United States Constitution, First and Fourteenth Amendments 4

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is unpublished by order of the Eleventh Circuit. It is reprinted in Appendix A hereto ("App. A") at page App. 1. The District Court's opinions denying summary judgment in the Earhart and Wilson cases (consolidated in the Eleventh Circuit) are also unpublished. They are reprinted herein at App. A, App. 12 and App. 13 respectively. The District Court's opinion references the order of the Magistrate Judge on Plaintiffs' Motion to Compel Answers to Deposition Questions because legislative immunity was also at issue therein. The District Court's order denying Petitioners' motion for reconsideration of the Magistrate's Order is reprinted in App. A, App. 17. The Magistrate's Order on the Motion to Compel Answers to Deposition Questions is reprinted at App. A, App. 19.

JURISDICTION

i. The order appealed from was filed on November 21, 2001.

ii. There has been no motion for rehearing or any extension of time to file a Petition for Writ of Certiorari.

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the Order appealed from's filing.

iii. The statutory provision which confers jurisdiction on this Court to review on Writ of Certiorari the judgment in question is 28 U.S.C. § 1254(1) (2001).

STATUTE INVOLVED IN THE CASE

This case involves common law legislative immunity in the context of a civil rights action pursuant to 42 U.S.C. § 1983 (2001).

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Facts

In October of 1996, Defendant, David Owens, was elected Superintendent of the Clay County School District. He defeated the former Superintendent, Phyllis May. [Wilson – Complaint p.3]. Plaintiffs Wilson and Earhart were middle-management administrators under the former Superintendent who supported her unsuccessful reelection effort. After Owens became Superintendent, the School Board, on Owens's recommendation, effected an administrative reorganization which included elimination of various positions. Among the positions eliminated or reconfigured were those held by Wilson and Earhart.[1]

---

[1] The process for the reorganization was as follows: In March of 1997, Owens proposed the District Staff Allocations for the 1997-98 school year to the Clay County School Board and recommended its approval. [Wilson – Mot. Sum. Judg. Exh. 2; Wortham Aff. p.1]. The Staff Allocations addressed approximately 3000 positions within the Clay County School District and included changes and revisions to numerous other positions. [Wilson – Wortham Aff. Exh. B pp.2-7]. Included within the Staff Allocations was a reorganization of the School Board's Instructional Division. Seven new positions were created and eleven positions were deleted within the Instructional Division at a calculated cost savings of $200,813. [*Id.* p.2 & Exh. B, Wortham Aff. p.2]. Wilson had been Director of Instructional Support Services, and Earhart had been Supervisor of Professional Development and Support Services. These were two of the eleven positions deleted in the Staff Allocations relating to the Instructional Division. The reorganization had to be voted on and passed by the Board as the legislative authority for the county's educational system. The Board's passage of the reorganization plan occurred in formal session on March 20, 1997, following completion of the

Wilson and Earhart now claim that the School Board eliminated their positions to retaliate against them for their support of former Superintendent May. [Wilson Complaint p.5; Earhart Complaint p.4].

The School Board[2] moved for summary judgment before the district court on legislative immunity grounds, relying on *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). The district court denied summary judgment on the ground that *Bogan* applied only to individual members of local legislative bodies, not to the bodies themselves.

The School Board appealed to the Eleventh Circuit. The Eleventh Circuit affirmed the denial of summary judgment, holding that *Bogan* is limited in application only to "local legislators and executives" and does not apply to the entities of which they are a part. The Eleventh Circuit adhered to its pre-*Bogan* decision in *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), holding that *Hernandez* was not overruled by *Bogan*.

II. Basis of Jurisdiction in the United States District Court

The basis for jurisdiction in the United States District Court was pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). The substantive claims arose out of the First and

---

process for introduction, consideration, and action on proposed legislation.

[2] References to the School Board include Owens in his official capacity.

Fourteenth Amendments to the United States Constitution and were brought pursuant to 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

This Court's writ is needed to preserve *Bogan* and the historical immunity vouchsafed in *Bogan*. The Eleventh Circuit ruling deprives *Bogan* of a great part of its vitality. *Bogan*'s policy of precluding inquiry into the motives of legislators will be nullified if litigants who cannot sue legislators individually can accomplish the same effect by the alternate device of suing them collectively as a legislative body, yet assert liability based upon allegedly improper legislative motives. There accordingly is a serious need for guidance from this Court as to *Bogan*'s intended scope.

This Court has refused to permit such nullification of legislative immunity for state level legislative bodies. *Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. 719 (1980) (Virginia Supreme Court); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (California Senate Fact-Finding Committee on Un-American Activities). The Eleventh Circuit, however, by an over-narrow interpretation of *Bogan* arbitrarily has placed local legislative bodies in a different status, and thereby has grievously derogated *Bogan* and the concept of legislative immunity.

The Eleventh Circuit's derogation of *Bogan* presents a question of national importance. Literally thousands of local legislative authorities will be subject to suit based on claims of improper legislative motive, contrary to *Bogan*'s holding that the courts may not inquire into such

matters. The Eleventh Circuit's ruling means that *Bogan* will have no application to the great bulk of the nation's legislative bodies. The question presented, accordingly, is one which well warrants this Court's attention.

The Eleventh Circuit's ruling is not only counter to the spirit and purpose of *Bogan* with respect to inquiry into legislative motives, but it also conflicts with the principal historical authority relied upon by this court in *Bogan*. *See, Wilson v. New York*, 1 Denio 595 (N.Y. 1845) (applying legislative immunity both to local legislators and to their local legislative body).

Further, the Eleventh Circuit has created conflict between Circuits. The Ninth Circuit has held legislative immunity applicable to a local legislative body. *Jax v. Henslee*, 201 F.3d 444 (9th Cir. 1999) (unpublished opinion) (affirming a summary judgment in favor of county commissioners individually and in their official capacities as the county commission).[3]

Whether local entities are protected by legislative immunity is an important question which goes to the very core of our tri-partite system of government. This case directly addresses the question whether the courts can or should interfere with the legislative process to permit second guessing of the motives of legislators in their legislative acts, and impose liability on local

---

[3] Suing officials in their official capacity is "only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

legislative bodies for actions historically held to be immune from actionability.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

DATZ, JACOBSON, LEMBCKE & WRIGHT, P.A.

KENNETH B. WRIGHT, ESQUIRE
Counsel of Record
Florida Bar No.: 0893791
SAMUEL S. JACOBSON, ESQUIRE
Florida Bar No.: 039090
One Independent Drive, Suite 2902
Jacksonville, FL 32202
(904) 355-5467
Attorneys for Petitioners

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-14392

D. C. Docket No. 98-01080-CV-J-20C

DAWN F. WILSON,
Plaintiff-Counter-Defendant-Appellee,

versus

CLAY COUNTY SCHOOL BOARD,
Defendant-Counter-claimant-Appellant,

DAVID OWENS, in his individual and official capacity as Superintendent of Clay County District Schools,
Defendant-Appellant.

* * *

No. 00-15092

D. C. Docket No. 99-00857-CV-J-20B

KAY S. EARHART,
Plaintiff-Appellee,

versus

CLAY COUNTY SCHOOL BOARD,
DAVID OWENS, in his individual and official capacity as Superintendent of Clay County District Schools,
Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(November 21, 2001)

Before ANDERSON, Chief Judge, HULL and FAY, Circuit Judges.

PER CURIAM:

In separate lawsuits, Plaintiff-Appellees Dawn F. Wilson and Kay S. Earhart brought § 1983 claims against Defendant-Appellants Clay County School Board and David Owens, individually and in his official capacity as Superintendent of Clay County District Schools. The School Board and Superintendent Owens appeal the district court's denial of their motions for summary judgment. After review and oral argument, we affirm the denial of summary judgment to the School Board, but dismiss Owens' appeal for lack of jurisdiction.

I. FACTUAL BACKGROUND

Plaintiff-Appellees Dawn F. Wilson ("Wilson") and Kay S. Earhart ("Earhart") had worked for the Clay County School Board ("School Board") for almost two decades. In 1996, Wilson served as its Director of Instructional Programs and Earhart served as its Supervisor of Professional Development and Support Services.

During the Superintendent's election in October 1996, Wilson and Earhart openly and actively supported Phillis May, the incumbent Superintendent of the School Board. Defendant-Appellant Owens defeated May in that

election, thereby becoming the School Board's new Superintendent. Wilson and Earhart allege that Owens' agents informed them there would be consequences for their having supported May in the election.

In March 1997, Owens, as the new Superintendent, proposed the District Staff Allocations ("Allocations") for the 1997-98 school year to the School Board and recommended its approval. The allocations addressed approximately 3,000 positions within the school district and changed numerous positions. Among the changes was a reorganization of the Instructional Division. That reorganization created seven new positions and eliminated eleven positions, including Wilson's and Earhart's. The School Board subsequently approved the Allocations.

Although their positions as administrators were eliminated, Wilson's and Earhart's association with the School Board did not end. For the 1997-98 school year, Earhart accepted a position as a first grade teacher and Wilson accepted a paid sabbatical leave to pursue a doctorate degree.

Pursuant to her written agreement, Wilson agreed (1) to accept a position with the School Board upon return from her sabbatical and (2) to reimburse the school district for salary and benefits paid during her sabbatical if Wilson violated the conditions of her leave. Following her leave, Wilson accepted a teaching position for the 1998-99 school year, but resigned before the school year started. Subsequently, Wilson declined to repay her sabbatical salary. Superintendent Owens recommended that the School Board seek reimbursement of this salary from

Wilson. The School Board then voted to pursue legal action against Wilson for reimbursement.

II. PROCEDURAL HISTORY

Wilson filed suit against the School Board and Owens ("Defendants"), asserting a First Amendment retaliation claim under 42 U.S.C. § 1983 and a breach of contract claim under state law ("the *Wilson* case"). Earhart filed a separate suit against the same Defendants, also asserting a First Amendment retaliation claim under § 1983 ("the *Earhart* case"). The district court denied Defendants' motion to consolidate the two cases.

Defendants first moved for summary judgment in the *Wilson* case relying, in part, on the defense of absolute legislative immunity. Specifically, Defendants argued that they were entitled to legislative immunity for any acts in connection with (1) the elimination of Wilson's and Earhart's positions pursuant to the recommendation and approval of the Allocations and (2) the decision to seek reimbursement of Wilson's sabbatical pay and benefits. Before the district court ruled on this motion, discovery ensued.

A. Discovery

Discovery in the *Wilson* and *Earhart* cases proceeded jointly. Wilson and Earhart ("Plaintiffs") deposed Superintendent Owens, Deputy Superintendent Benjamin Wortham, and School Board member, Carol Vallencourt. During their depositions, Owens and Vallencourt refused to answer certain questions on the basis of legislative

immunity. Plaintiffs jointly moved to compel answers to these deposition questions.

The magistrate judge granted Plaintiffs' motion to compel in part. The magistrate judge concluded that the answers to certain deposition questions were necessary to determine whether Defendant Owens was entitled to legislative immunity. This discovery order specified exactly which questions were to be answered. The district court denied Defendants' joint motion for reconsideration of this discovery order and affirmed the magistrate judge's rulings.

Plaintiff Wilson then filed a motion to reopen discovery because the discovery deadline in the *Wilson* case had expired during the pendency of Plaintiffs' motion to compel. Because the discovery deadline in the *Earhart* case was nearing, Plaintiff Earhart filed a motion to extend discovery. In support of her motion, Plaintiff Wilson noted that Plaintiffs were "now entitled . . . to discovery previously denied to them . . . [which] is pertinent to determination of the issue of legislative immunity in the context of the defendants' motion for summary judgment." Defendants did not oppose either motion.

B. District Court's Rulings

In the same interlocutory order, the district court ruled on both (1) Plaintiffs' motions regarding discovery and (2) Defendants' motion for summary judgment in the *Wilson* case. The court granted Plaintiff Wilson's motion to reopen discovery and Plaintiff Earhart's motion to extend discovery. The court denied summary judgment to Defendant Owens "without prejudice to the right of

Owens to renew his claim of absolute legislative immunity after the close of discovery." The court denied summary judgment outright to Defendant School Board, noting that the magistrate judge had "concluded 'that legislative immunity cannot apply to the School Board as an entity,' . . . but could apply to Defendant Owens only." Defendants timely appealed this order.

Defendants subsequently moved for summary judgment in the *Earhart* case. The district court denied that motion as moot, stating that it "entered an order denying an identical motion in the companion case of *Wilson* . . . which also applied to the instant case." Defendants timely appealed this order as well.[4]

III. JURISDICTION

We first conclude that we have jurisdiction over Defendant School Board's appeals in both cases but not over Defendant Owens' appeals.

This Court's appellate jurisdiction is generally limited to final decisions of the district courts. *See* 28 U.S.C. § 1291. Certain collateral orders are immediately appealable, however, if they "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Thus, we have exercised jurisdiction over the

---

[4] This Court consolidated Defendants' appeals in the *Wilson* and *Earhart* cases.

denial of a claim of legislative immunity at the summary judgment stage. *See Smith v. Lomax*, 45 F.3d 402, 404 n.6 (11th Cir. 1995) (noting that "[w]e have jurisdiction to review the district court's rejection of [defendants'] claims of legislative and qualified immunity" under the collateral order doctrine of *Cohen*). Because the district court conclusively determined that Defendant School Board is not entitled to legislative immunity and denied summary judgment on that basis, we have jurisdiction over Defendant School Board's appeals in both cases.

In sharp contrast, the district court's determination regarding Defendant Owens' motions was, in effect, that it could not rule on Owens' claim of legislative immunity until Defendants complied with the outstanding discovery order compelling Defendant Owens and two other witnesses to answer specific deposition questions. Unlike with Defendant School Board, the district court denied Defendant Owens' summary judgment motion stating specifically that its denial was "without prejudice" to Owens' right "to renew his claim of legislative immunity after the close of discovery." The district court also quoted the magistrate judge's finding that additional discovery was necessary to evaluate Owens' entitlement to legislative immunity and noted that it had adopted this finding. In fact, in its same order denying Owens' summary judgment motion without prejudice, the district court granted Plaintiff Wilson's motion to reopen discovery and Plaintiff Earhart's motion to extend discovery. Moreover, certain questions Defendants had refused to

answer related to the factual development Plaintiffs had sought regarding the legislative immunity issues.[5]

Given the unique entanglement of the discovery and summary judgment issues regarding Defendant Owens' claim of legislative immunity and construing the district court's orders as a whole, we conclude that the district court's orders were tantamount to a ruling that it was unable to rule at all on Owens' summary judgment motions based on legislative immunity until further discovery and, thus, those orders were far from conclusive as to Defendant Owens' claim of legislative immunity. Thus, we lack jurisdiction over Defendant Owens' appeals in both cases.

IV. SCHOOL BOARD'S APPEAL

Because the district court's orders were conclusive as to Defendant School Board's claim of legislative immunity, we turn to the merits of Defendant School Board's appeals.[6] We conclude that the district court did not err in denying summary judgment to the School Board because legislative immunity does not apply to the School Board as an entity. *See Hernandez v. City of*

---

[5] Because this appeal intervened, Defendants have not yet complied with the district court's discovery order.

[6] We review *de novo* a district court's denial of a motion for summary judgment based on legislative immunity. *See Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056, 1060 (11th Cir. 1992).

Lafayette, 643 F.2d 1188 (5th Cir. May 1, 1981).[7] In *Hernandez*, we examined closely the issue of legislative immunity and relevant Supreme Court precedent, and concluded that a municipal entity is not entitled to legislative immunity. 643 F.2d at 1194-97. More specifically, we determined that a city – as an entity – is not entitled to legislative immunity from constitutional claims in a § 1983 suit, even though individual local legislators are entitled to legislative immunity. *Id.* at 1196. Although *Hernandez* involved a city, the parties here do not contend that Defendant School Board is not similar to a city. Indeed, like a city, Defendant School Board is a governmental entity performing local functions. *See Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 133 (5th Cir. 1986) (holding that "even if the actions of the [s]chool [b]oard members are legislative, rather than administrative, the [s]chool [b]oard itself as a separate entity is not entitled to [legislative] immunity for violation of [the defendant's] constitutional rights").[8]

Instead, Defendant School Board argues that the Supreme Court's decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), effectively overrules our decision in *Hernandez*. We disagree. In *Bogan*, the Supreme Court held that local legislators and executives acting in a legislative capacity are immune from suit under § 1983 for their

---

[7] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[8] *See also Kingsville Independent School District v. Cooper*, 611 F.2d 1109, 1112-13 (5th Cir. 1980) (considering a school board a " 'local governing body' " and concluding, among other things, that such an entity is not entitled to claim qualified immunity).

legislative acts. 523 U.S. at 53-54 ("Thus, we now make explicit what was implicit in our precedents: [l]ocal legislators are entitled to absolute immunity from § 1983 liability for their legislative activities."). The Supreme Court, however, did not reach the issue of whether local entities are entitled to legislative immunity because the entity defendant – the city – had been dismissed from the case in the proceedings below on grounds other than legislative immunity. *Id.* at 48 n.2 (noting that the First Circuit set aside the jury verdict against the city because "the jury could reasonably infer unlawful intent only as to two of the city council members, and municipal liability could not rest 'on so frail a foundation.' ").

In any event, to the extent the Supreme Court does address entity liability in *Bogan*, the Supreme Court's reasoning supports our conclusion in *Hernandez*. More specifically, in discussing why legislative immunity should extend to local legislators, the Supreme Court noted that "certain deterrents to legislative abuse may be greater at the local level than at other levels of government. *Municipalities themselves can be held liable for constitutional violations. Id.* at 53 (emphasis added). For these reasons, we conclude that there is no merit to Defendant School Board's claim that *Bogan* overrules *Hernandez*.[9]

---

[9] In addition to the legislative immunity issue, Defendant School Board's appeal brief complains to some extent about the discovery rulings in the district court's order denying summary judgment in the *Wilson* case. On the other hand, Defendant School Board does not include the discovery rulings in its statement of the issues on appeal thus making it unclear whether they seek to appeal those rulings. In any event, although we generally do not review interlocutory discovery

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order, filed July 21, 2000, as to Defendant School Board in the *Wilson* case and the district court's order, filed September 15, 2000, as to Defendant School Board in the *Earhart* case and DISMISS Defendant Owens' appeals in both cases for lack of jurisdiction.[10]

---

rulings, the discovery rulings in this case are in the same order as the district court's denial of summary judgment in the *Wilson* case, and the discovery issues are inextricably intertwined with the summary judgment issues. Thus, to the extent Defendant School Board challenges the district court's discovery rulings, we conclude the district court did not abuse its discretion in its discovery rulings. *See Fund for Animals v. Rice*, 85 F.3d 535, 542 (11th Cir. 1996) (district court's discovery rulings reviewed for an abuse of discretion). Indeed, although the purpose of absolute immunity, in part, is to protect a defendant from the burdens of pretrial discovery, *see Brown v. Crawford County*, 960 F.2d 1002, 1010 n.13 (11th Cir. 1993), we have recognized that the "absolute immunity inquiry" is a fact-sensitive one of whether the individual defendants were "engaging in legislative activity." *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982) (reversing an order granting summary judgment on legislative immunity grounds because although "a factual development [may] disclose that the [defendants] were acting in a legislative role . . . the meager facts presented in this record are too equivocal to warrant summary judgment").

[10] Wilson's motion to dismiss Defendants' appeal, dated August 31, 2000, and Earhart's motion to dismiss Defendants' appeal, dated October 4, 2000, are both denied as moot. Wilson and Earhart's joint motion for sanctions, dated March 12, 2001, is also denied.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

KAY S. EARHART,
Plaintiff,

vs.

CLAY COUNTY SCHOOL BOARD, etc.
Defendants.
_____/

Case No.
3:99-cv-857-J-20B

(Date filed September 15, 2000)

ORDER

This case is before the Court on Defendant's Motion for Summary Judgment (Doc. No. 34, filed 8/31/00). Because this Court on July 21, 2000 entered an order denying an identical motion in the companion case of Wilson v. Clay County, Case No. 3:98-cv-1080-J-20C, which also applied to the instant case, this motion is **MOOT**.

DONE AND ENTERED at Jacksonville, Florida, this 14th day of August 2000.

/s/ _____
HARVEY E. SCHLESINGER
United States District Judge

Copies to:
Kenneth B. Wright, Esq.
Gray Thomas, Esq.
Garry Randolph
Law Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAWN F. WILSON,

Plaintiff,

v.

CLAY COUNTY SCHOOL BOARD and DAVID OWENS, in his individual and official capacity as Superintendent of Clay County District Schools,

Defendants.

Case No. 3:98-cv-1080-J-20C

KAY S. EARHART,

Plaintiff,

v.

CLAY COUNTY SCHOOL BOARD, DAVID OWENS, in his individual and official capacity as Superintendent of Clay County District Schools,

Defendants.

Case No. 3:99-cv-857-J-20B

(Date filed: July 21, 2000)

ORDER

On February 14, 2000, in Case No. 3:98-cv-1080-J-20C, the Defendants filed a Motion and Memorandum for Summary Judgment (Docs. No. 28 & 29, filed February 14, 2000). Plaintiff Wilson filed an opposition on March 6,

2000. *See* Doc. No. 32. In the dispositive motion, the Defendants assert that Plaintiff Wilson's Count I claim, pursuant to 42 U.S.C. § 1983, should be dismissed since they are entitled to absolute immunity from suits based on legislative actions. Both Plaintiff Wilson and Earhart argue that the Defendants' assertions of legislative immunity are misguided.

On May 18, 2000, the United States Magistrate Judge examined the issue of legislative immunity as it applied to certain discovery issues. *See* Doc. No. 53. The Magistrate Judge concluded "that absolute legislative immunity cannot apply to the School Board as an entity," *see* Doc. No. 53 at 7-8, but could apply to Defendant Owens only "if the conduct at issue is 'legislative,' and Owens' actions were integral steps in the legislative process. . . . " *Id.* at 8-9. More specifically, the Magistrate Judge determined "that under the evidence in the record only the March, 1997, terminations as the result of the School Board's approval of Owens' District Staff Allocations are subject to legislative immunity[,]" noting that "additional discovery which will be allowed may establish, contrary to the record evidence at this point, that the Staff Allocation process was not legislative in nature." *Id.* at 12 n.3.

On June 5, 2000, the Defendants filed a Request for Reconsideration of the Magistrate Judge's Order (Doc. No. 54). Upon review, the undersigned found that the Magistrate Judge's Order was not clearly erroneous or contrary to law, denied the Defendants' motion for reconsideration, and affirmed the Magistrate Judge's findings. *See* Doc. No. 56, filed June 26, 2000. Subsequently, Plaintiffs Wilson and Earhart filed an Unopposed Motion to

Re-open and Extend Discovery Deadlines (Doc. No. 57, filed July 17, 2000).

Upon due consideration it is **ORDERED** that:

1) the Motion for Summary Judgment (Doc. No. 28) against Plaintiff Wilson in Case No. 3:98-cv-1080-J-20C, is **DENIED** as to the School Board, and as to Defendant Owens', is **DENIED WITHOUT PREJUDICE**, to the right of Defendant Owens' to renew his claim of legislative immunity after the close of discovery;

2) Plaintiff Wilson's Motion to Re-open Discovery (Doc. No. 57, Case No. 3:98-cv-1080-J-20C) is **GRANTED**, such that the following deadlines are rescheduled as follows:

Discovery	October 31, 2000;
Dispositive Motion Deadline	November 30, 2000;
Pre-trial	March 2, 2001 at 1:30 P.M.;
Trial	Trial term commencing on April 2, 2001 at 9:00 A.M.;

and

3) Plaintiff Earhart's Motion to Extend Discovery (Doc. No. 30, Case No. 3:99-cv-857-J-20B) is **GRANTED**, such that the following deadlines are rescheduled as follows:

Discovery	October 31, 2000;
Dispositive Motion Deadline	November 30, 2000;
Pre-trial	March 2, 2001 at 1:30 P.M.;

Trial	Trial term commencing on April 2, 2001 at 9:00 A.M..

DONE AND ENTERED at Jacksonville, Florida, this 20th day of July, 2000.

/s/ _____
HARVEY E. SCHLESINGER
United States District Judge

Copies to:
Wm. J. Sheppard, Esq.
Samuel S. Jacobson, Esq.
Kenneth B. Wright, Esq.
Garry Randolph, Courtroom Deputy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAWN F. WILSON,

Plaintiff,

v.

CLAY COUNTY SCHOOL BOARD and DAVID OWENS, in his individual and official capacity as Superintendent of Clay County District Schools,

Defendants.

Case No.:
3:98-cv-1080-J-20C

(Date filed June 25, 2000)

ORDER

Before the Court is the Defendants' Motion for Reconsideration of Magistrates Order on Plaintiff's Motion to Compel Answers to Deposition Questions (Doc. No. 54, filed June 5, 2000). The Plaintiff opposes the motion. *See* Doc. No. 55, filed June 19, 2000.

Upon review of the Magistrate Judge's Order (Doc. No. 53, filed May 18, 2000), the Defendants' Motion, and the Plaintiff's response, the Court finds that the Defendants' objections are without merit. The Magistrate Judge's Order was not clearly erroneous or contrary to the law.

Accordingly, the Defendants' Motion for Reconsideration is **DENIED**, and the Magistrate Judge's Order will stand as issued.

DONE AND ORDERED at Jacksonville, Florida, this 26th day of June, 2000.

/s/ _____
HARVEY E. SCHLESINGER
United States District Judge

Copies to:

The Honorable John E. Steele,
United States Magistrate Judge
The Honorable Timothy J. Corrigan,
United States Magistrate Judge

Wm. J. Sheppard, Esq.
Samuel S. Jacobson, Esq.
Kenneth B. Wright, Esq.
Law Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAWN F. WILSON,

Plaintiff,

vs. Case No. 3:98-cv-1080-J-20C

CLAY COUNTY SCHOOL BOARD, et al.,

Defendants.

KAY S. EARHART,

Plaintiff,

vs. Case No. 3:99-cv-857-J-20B

CLAY COUNTY SCHOOL BOARD, et al.,

Defendants.

(Date filed May 18, 2000)

ORDER

This matter is before the Court on Plaintiff's Motion to Compel Answers to Deposition Questions (Doc. #43 in Case No. 3:98-cv-1080-J-20C and Doc. #18 in Case No. 3:99-cv-857-J-20B). Defendants have filed a Response (Doc. #48 in Case No. 3:98-cv-1080-J-20C) which applies to each case. The Court heard oral argument on May 15, 2000.

I. Factual Summary

Plaintiff Dawn F. Wilson (Wilson) was a nineteen-year employee of the Clay County School Board (the School Board) and in 1996 served as its Director of Instructional Programs. Plaintiff Kay S. Earhart (Earhart) was a teacher or administrator for the School Board since 1980, and in 1996 served as its Supervisor of Professional Development and Support Services. Plaintiffs openly and actively supported the incumbent School Board superintendent, Phyllis May, in the October, 1996 election. David Owens (Owens) defeated Ms. May in this election and became the Clay County School Board Superintendent. Plaintiffs allege that they were thereafter informed by "an agent" or agents of Owens that there would be consequences to their being on the losing side of the election.

Plaintiff Wilson alleges that in January, 1997 she was involuntarily transferred from her position as Director of Instructional Programs to the position of Director of Instructional Support Services, and was excluded from the process of hiring her own administrative secretary for the new position. Wilson further alleges that in February, 1997 she was given negative comments on her annual performance review, against the recommendation of the supervisor under whom she had worked for nine years. Plaintiff Earhart alleges that beginning in January, 1997 she was excluded from monthly administrative staff meetings.

In March, 1997, Owens proposed District Staff Allocations for the 1997-98 school year to the School Board and recommended its approval. The allocations addressed approximately 3,000 positions within the

school district, and changed and revised numerous positions. Among the changes was a reorganization of the Instructional Division, in which seven new positions were created and eleven positions were deleted, at a projected savings of over $200,000.

Plaintiffs allege that on March 12, 1997, Owens told them that their positions as administrators were being terminated due to downsizing, although they assert that a new organizational chart belied the assertion that the department was in fact downsizing. The Staff Allocations recommended by Owens were approved by the School Board on March 20, 1997. Plaintiffs' positions were deleted, resulting in the termination of them as administrators.

A newspaper reported statements by Owens that it was doubtful Wilson would be hired as a principal or assistant principal, but could get a job as a teacher. Instead, in June, 1997 Wilson applied for and was granted a paid sabbatical leave from the School Board for the 1997-98 school year so she could continue a doctoral program. The sabbatical leave was memorialized in a written agreement. After completing the sabbatical year, Wilson accepted a teaching position with the Clay County Public School District as a kindergarten teacher for the 1998-99 school year. However, on July 15, 1998, before the school year started, Wilson accepted a twelve month contract from the Duval County School Board as Coordinator of Instructional Design, and submitted a letter of resignation to the Clay County School Board. On August 15, 1998, Owens recommended that the School Board seek reimbursement of over $19,000 paid to Wilson during the sabbatical leave. The School Board subsequently voted to

pursue legal action against Wilson for reimbursement of the sabbatical pay.

Earhart asserts that Owens refused her request to be laterally transferred to an assistant principal position, and that she thereafter obtained employment as a first grade teacher for the School Board. Earhart further alleges that agents of defendants have prohibited and inhibited her from participating in committees and other functions and associations and furthering her professional opportunities, and that the School Board has refused to hire her for open administrative positions for which she applied and was qualified.

Plaintiffs thereafter filed the instant lawsuits. Count I of Wilson's Verified Complaint (Doc. #1) is filed under 42 U.S.C. § 1983 against the School Board and Owens individually and in his official capacity as Superintendent of the School Board. It alleges that the School Board and Owens harassed plaintiff, terminated her employment, and took steps to recover her sabbatical leave pay as a direct and proximate result of the exercise of her First Amendment rights during the 1996 School Board superintendent election. Count II alleges a state law claim of breach of contract for alleged violation of the sabbatical leave agreement. Count I of Earhart's Verified Complaint (Doc. #1) is filed under 42 U.S.C. § 1983 against the School Board and Owens individually and in his official capacity as Superintendent of the School Board. It alleges that the School Board and Owens harassed plaintiff and terminated her employment, as a direct and proximate result of the exercise of her First Amendment rights during the 1996 School Board superintendent election.

Owens and the School Board raised legislative immunity as an affirmative defense. (Docs. # 39, 40, 41).

At the February, 2000 depositions of Owens and School Board member Carol Vallencourt, both deponents refused to answer certain questions posed by plaintiff's counsel, asserting a broad claim of legislative immunity and, to a lesser extent, a claim of marital privilege. The parties were unable to resolve their disputes, and the motion to compel followed.

II. Conclusions of Law

A. Legislative Immunity

Plaintiffs assert that: (1) legislative immunity does not constitute an evidentiary privilege; (2) legislative immunity is not applicable to this case at all; and (3) if it does apply and is an evidentiary privilege, legislative immunity was improperly invoked to a number of the questions during the depositions. Defendants respond that local legislators are absolutely immune from § 1983 suits in both individual and official capacities and that this immunity includes a privilege against being questioned about their legislative acts.

(1) General Legislative Immunity Principles:

Legislative immunity was established in the Speech and Debate Clause of the United States Constitution, art. I, section 6, clause 1, and has been extended by the Supreme Court to federal, state, regional, and local legislators. *Bogan v. Scott-Harris*, 523 U.S. 44, 49, 54 (1998). Legislative immunity provides absolute immunity from

suit, not simply immunity from damages. *See Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1010 (11th Cir. 1992). This absolute legislative immunity precludes suits pursuant to 42 U.S.C. § 1983. *Bogan v. Scott-Harris*, 523 U.S. at 49; *Woods v. Gamel*, 132 F.3d 1417, 1419 (11th Cir. 1998).

"Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.' " *Bogan v. Scott-Harris*, 523 U.S. at 54 (citing *Tenny* [sic] *v. Brandhove*, 341 U.S. 367, 376 (1951)); *Macuba v. DeBoer*, 193 F.3d 1316, 1320 (11th Cir. 1999). Whether an act is "legislative" turns on the nature of the act, not the position, motive or intent of the official performing it. *Bogan v. Scott-Harris*, 523 U.S. at 54; *Woods v. Gamel*, 132 F.3d at 1419. The fundamental question is whether the actions of which plaintiff complains were legislative acts, regardless of the intent or motivation. *Bogan v. Scott-Harris*, 523 U.S. at 55; *Woods v. Gamel*, 132 F.3d at 1420. As stated in *Woods v. Gamel*, 132 F.3d at 1420 (quotations and citations omitted),

> An act is deemed legislative, rather than administrative or managerial, when it is policy making and of general application. Only those acts which are necessary to preserve the integrity of the legislative process are protected. Voting, debate and reacting to public opinion are manifestly in furtherance of legislative duties.

Voting on the action, however, does not automatically confer legislative immunity. As stated in *Smith v. Lomax*,

> A legislative act involves policy making rather than mere administrative application of existing policies. If the facts utilized in making a decision are specific, rather than general, in nature,

> then the decision is more likely administrative. Moreover, if the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature.

45 F.3d 402, 406 (11th Cir. 1995) (quoting *Crymes v. DeKalb County*, 923 F.2d 1482, 1485 (11th Cir. 1991)).

(2) Can Legislative Immunity Apply to Owens?

It is undisputed that Owens is the elected superintendent of the School Board, but is not a voting member of the School Board. This does not necessarily preclude application of absolute legislative immunity. In *Bogan v. Scott-Harris*, the Supreme Court stated, "We have recognized that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." 523 U.S. at 55 (citing *Supreme Court of Va v. Consumers Union*, 446 U.S. 719, 731-34 (1980)). The Court found a mayor's actions of introducing a budget to city council and signing into law the resulting ordinance were formally legislative, even though he was an executive official, because his actions were integral steps in the legislative process. *Id.* Thus, if the conduct at issue is "legislative," and Owens' actions were integral steps in the legislative process, Owens will be entitled to absolute legislative immunity.

(3) Can Legislative Immunity Apply to the School Board?

The School Board also asserts that it is entitled to absolute legislative immunity as an entity. Plaintiffs argue that the School Board as an entity is not entitled to

legislative immunity, even if individual School Board members and Owens may claim the immunity. Both sides concede that case law specifically discussing the issue is sparse.

The Supreme Court has summarily applied legislative immunity to the entity as well as individual legislators. *See Tenny v. Brandhove*, 341 U.S. 367 (1951) (special committee of the California Senate); *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719 (1980) (Virginia Supreme Court). The Court is satisfied, however, that intervening authority compel the conclusion that the School Board is not entitled to legislative immunity even if its members and Owens are immune in their individual capacities.

Hernandez v. City of Lafayette found legislative immunity to apply to a local mayor individually but, after analyzing the cases at length, not to the city as an entity. 643 F.2d 1188, 1194-1201 (5th Cir. May 1, 1981), *cert. denied*, 455 U.S. 907 (1982). *Hernandez* remains the law in this circuit.[1] In *DeSisto College, Inc. v. Line*, the court cited to a line of Eleventh Circuit cases which recognized absolute legislative immunity to extend to *individual* local legislators, but did not suggest that the entities would be immune. 888 F.2d 755, 765 (11th Cir. 1989). In *Woods v. Gamel*, the court assumed that legislative immunity is only applicable to suits against legislators in their individual capacities for money damages. 132 F.3d at 1418-19. Other circuits have come to the same conclusion. The

---

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Fourth Circuit, relying heavily on *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), concluded that the entity was not legislatively immune even if its members were immune in their individual capacity. *Burtnick v. McLean*, 76 F.3d 611, 612-13 (4th Cir. 1996); *see also Alexander v. Holden*, 66 F.3d 62, 68 (4th Cir. 1995). In *Minton v. St. Bernard Parish School Bd.*, 803 F. 2d 129, 133 (5th Cir. 1996), the Fifth Circuit held that a School Board as a legal entity was not immune from liability even if its members were legislatively immune.

Accordingly, the Court concludes that absolute legislative immunity cannot apply to the School Board as an entity, even if the individual board members and Owens do enjoy legislative immunity.

(4) Does Legislative Immunity Constitute an Evidentiary Privilege?

Plaintiffs argue that legislative immunity principles do not constitute an evidentiary privilege which may be raised during a deposition. The Court does not agree.

The Supreme Court has referred to legislative immunity as a privilege, *Tenny v. Brandhove*, 341 U.S. at 373-78, and the effect of such absolute immunity is certainly the functional equivalent of an evidentiary privilege in the context of a discovery dispute. As noted above, if the acts complained of are legislative, and thus within the scope of legislative immunity, there is absolute immunity from suit. Such immunity includes the prohibition against being compelled to answer deposition questions about

legislative acts. To this extent, a person subject to absolute legislative immunity possesses a testimonial privilege. *See Burtnick v. McLean*, 76 F.3d at 613 (stating that plaintiff's attempts to establish a prima facie case against local board must be accomplished without the benefit of the board members' testimony)[2]; *Simpson v. City of Hampton, Va.*, 166 F.R.D. 16, 18-19 (E.D. Va. 1996). If any of the acts complained of in these cases are legislative in character, plaintiffs will have to prove their case without the testimony of Owens or the School Board members as to the legislative acts. *See Burtnick v. McLean*, 76 F.3d at 613.

(5) Does Legislative Immunity Apply to These Cases?

To determine whether legislative immunity applies to any of the components of these cases, it is necessary to examine the specific conduct which is alleged to have violated plaintiffs' constitutional rights. These acts are then examined to determine if they are "legislative acts."

Plaintiff Wilson alleges the following acts were taken in violation of her First Amendment rights: (1) her January, 1997 involuntary transfer from her position as Director of Instructional Programs to the position of Director of Instruction Support Services; (2) her exclusion from the process of hiring her own administrative secretary for the new position; (3) the February, 1997 negative comments she received on her annual performance review against the recommendation of her long-time supervisor; (4) her

---

[2] This privilege may be waived by board members. *Alexander v. Holden*, 66 F. 3d at 68 n.4.

March, 1997, termination as the result of the School Board's approval of Owens' District Staff Allocations for the 1997-98 school year; and (5) the School Board's approval of Owens' August 15, 1998, recommendation that the School Board seek reimbursement of over $19,000 paid to her during the sabbatical leave. Plaintiff Earhart alleges the following acts were taken in violation of her First Amendment rights: (1) her exclusion from monthly administrative staff meetings beginning in January, 1997; (2) her March, 1997, termination as the result of the School Board's approval of Owens' District Staff Allocations for the 1997-98 school year; (3) the refusal to grant her a lateral transfer to an assistant principal position; (4) unspecified acts which prohibited and inhibited her from participating in committees and other functions and associations and further her professional opportunities; and (5) the refusal to hire her for open administrative positions for which she applied and was qualified. Defendants' legislative immunity claim hinges on whether these actions were legislative or administrative.

The Court concludes that under the evidence in the record only the March, 1997, terminations as the result of the School Board's approval of Owens' District Staff Allocations are subject to legislative immunity. Only that conduct qualifies as "legislative acts."[3]

---

[3] This finding is, of course, not binding on the district judge in connection with the pending summary judgment motion. The additional discovery which will be allowed may establish, contrary to the record evidence at this point, that the Staff Allocation process was not legislative in nature. But at this point, the Court concludes legislative immunity does apply.

Personal decisions to hire, fire or demote certain individuals are clearly not an integral part of the legislative process, but are merely administrative acts even if a vote approving the action is involved. *Smith v. Lomax*, 45 F.3d at 405; *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062-63 (11th Cir. 1992). "Typically, legislators' employment decisions are deemed administrative acts." *Smith v. Lomax*, 45 F.3d at 405-06. *See also Canary v. Osborn*, ___ F.3d ___, 2000 WL 526937 at *8 (6th Cir. 2000). With the exception of the Staff Allocation approval and the Wilson reimbursement decision, there is no indication that the School Board had any involvement in such employment decisions. Even if it did, legislative immunity would not apply to such administrative decisions. The acts were simply internal administrative, employment related conduct, not general policy statements or actions. While there was a vote as to pursuit of the sabbatical pay reimbursement, this was still an employment decision about a single employee, not a policy decision of general application. Thus, even the vote to sue Wilson is no more than an administrative act. *See Smith v. Lomax*, 45 F.3d at 405-06 (vote on appointment of Board clerk not legislative act).

Adoption of the staff allocation plan, on the other hand, involved line-drawing, policy-making decisions which are the cornerstone of legislative activity. *See Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d at 1063. As in *Bogan v. Scott-Harris*, it "reflected a discretionary policymaking decision implicating the budgetary priorities of the [School Board] and the services the [School Board] provides to its constituents." 523 U.S. at 55-56. It was clearly a legislative act. *Cf. Macuba v. DeBoer*, 193 F. 3d at

1321 (reorganization of department which resulted in elimination of employment position entitled to legislative immunity); *Woods v. Gamel*, 132 F.3d at 1419-20 (act of passing new budget within scope of legislative immunity). While it certainly impacted employment, it was accomplished through the traditional legislative functions of policymaking and budgetary restructuring. *Compare Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 8 (1st Cir. 2000).

Not all discovery about the Staff Allocation is precluded because it appears to be protected by legislative immunity. Plaintiffs are entitled to such discovery as will enable them to fully develop the facts necessary to determine the applicability of legislative immunity to the particular process. *See Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 830 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 995-96 (11th Cir. 1990), *cert. denied*, 120 S.Ct. 67 (1999) ("We do not pretermit a factual development that would disclose that the Commissioners were acting in a legislative role."; *cf. CJR Investments, Inc. v. City of Escambia, Fla.*, 132 F.3d 1359, 1364-65 (11th Cir. 1998) (noting allowance by trial court of discovery in context of qualified immunity).

(6) Specific Deposition Questions:

With these principles in mind, the Court will now address the specific deposition questions to which legislative immunity objections were posed. Counsel for defendants' stated position at the deposition was that legislative immunity prevents a legislator from being

questioned about any action they took as a legislator or in a legislative capacity. (Deposition of Carol Vallencourt, p. 21). As discussed above, this is much too broad, particularly in light of the allegations in this case.

(a) David Owens Deposition (Doc. #35):

1. Pages 29-30: The motion to compel is **granted** to the extent the "how" question refers to the number of directors. Owens shall testify as to the change in the numbers of directors.

2. Pages 31-33: The motion to compel is **granted** to the extent that Owens shall describe the *process* in which he engaged which resulted in any change to the titles or nature of the directorships within the Instructional Division. This description is necessary to accurately determine whether the process was a component of a legislative act.

3. Pages 34-35: The motion to compel is **granted** to the extent that Owens shall describe the *process* in which he engaged which resulted in the change to K-6 and 7-12. This description is necessary to accurately determine whether the process was a component of a legislative act.

4. Page 38: The motion to compel is **granted** as to the date(s) of the first allocation decision Owens recommended. Nothing about the dates are within legislative immunity, and any claim has been waived by defendants' inclusion of the date of the recommendation in their brief in support of the motion for summary judgment. (Case No. 3:98-cv-1080-J-20C, Doc. #29, p. 3).

5. Page 40: The motion to compel is **denied**. The motivation for the changes with respect to certain positions is within the absolute legislative immunity.

6. Page 44: The motion to compel is **denied**. What Owens reviewed prior to making his staffing recommendations is within the legislative process and is immune.

7. Pages 45-46: The motion to compel is **granted**. The impact of the staffing allocation on a specific person is not a legislative act.

8. Pages 47-48: The motion to compel is **granted**. Whether Owens was ever made aware of an employee's election preference or display of support is not a component of any legislative act and is not subject to legislative immunity. Any legislative immunity is waived by the Second Amended Answers. (Case No. 3:98-cv-1080-J-20C, Docs. #39, 40, 41, ¶8).

9. Pages 49-50: The motion to compel is **granted**. The identity of Owens employer or "boss" is a necessary predicate to determine if legislative immunity applies and is not itself a legislative act.

10. Pages 53-54: The motion to compel is **granted**. Comments made to Owens prior to his election as superintendent cannot be a component of any legislative act. Owens' entitlement to legislative immunity is derivative of his position as superintendent and the specific conduct he engaged in as superintendent. Prior to becoming superintendent, there is no basis to find he is capable of a legislative act under *Bogan*.

11. Pages 65-67: The motion to compel is **granted**. The reasons for wanting to make changes and the nature

of the changes Owens wanted to make prior to being sworn into office cannot be a component of any legislative act because he does not qualify under *Bogan*.

12. Page 75: The motion to compel is **granted**. A statement made by Owens at a public school board meeting is not protected from disclosure by legislative immunity. Owens was only asked if he made such a statement, not any other details about the statement. An answer to this question will not invade legislative immunity.

13. Pages 84-85: The motion to compel is **granted**. This relates to an administrative act, not a legislative act.

14. Pages 85-86: The motion to compel is **granted**. This relates to an administrative act, not a legislative act.

(b) Deposition of Carol Vallencourt (Doc. #36):

1. Page 12: The motion to compel is **granted** to the extent that Vallencourt shall describe the *process* by which the allocation decision occurred. This description is necessary to accurately determine whether the process was a component of a legislative act.

2. Pages 19-21: The motion to compel is **granted**. The vote itself, which was cast in public, is not protected from disclosure under legislative immunity.

3. Pages 53-54: The motion to compel is **granted**. Whether a certain matter is decided by the School Board as a matter of policy or by the superintendent is not itself a legislative act.

4. Pages 58-61: The Motion to compel is **granted**. As discussed above, conversations with Owens before he was sworn in as superintendent can not be a component of a legislative act.

5. Pages 63-64: The motion to compel is **granted**. The result of the allocations decision is not itself a legislative act protected by legislative immunity. The motion to compel is **denied** as to the question regarding the purpose of the allocations, since that is a component of a legislative act.

6. Pages 65-68: The motion to compel is **denied** as to discussions with staff members, the superintendent, Vallencourt's own analysis, and any questions concerning the correctness of the figures. These are components of legislative acts. The motion is **granted** as to the subsequent creation of a secretarial position, whether the allocations resulted in monetary savings, and Vallencourt's opinion as to the cause of such savings. These are not components of legislative acts.

B. Marital Privilege

During the Vallencourt deposition she testified that she received information from Mr. Graham, the ex-husband of School Board member Lisa Graham, who said that he had accused his wife of having an extramarital affair with Owens. (Doc. #36, pp. 23-27). Objections were made to Vallencourt's testimony concerning Mr. Graham's statement as to what his wife had responded. The Court concludes that regardless of the validity of the marital privilege objection, this double hearsay seeks to invade a privacy right for no apparent reason relevant to

this case and constitutes an abuse of the discovery process. The motion to compel will be **denied**.

Accordingly, it is now

ORDERED:

The Motions to Compel are resolved as set forth above.

DONE AND ORDERED at Jacksonville, Florida, this 17th day of May, 2000.

/s/ _____
UNITED STATES
MAGISTRATE JUDGE

Copies to:

Hon. Harvey E. Schlesinger
United States District Judge

Hon. Timothy J. Corrigan
United States Magistrate Judge

Counsel of Record